

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

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ePLUS, INC.

vs.

LAWSON SOFTWARE, INC.  
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:  
: Civil Action No.  
: 3:09CV620  
:  
:  
: January 18, 2011  
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COMPLETE TRANSCRIPT OF THE JURY TRIAL

BEFORE THE HONORABLE ROBERT E. PAYNE

UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

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P R O C E E D I N G S

THE CLERK: Civil action number 3:09CV00620, ePlus, Incorporated, versus Lawson Software, Incorporated. Mr. Scott L. Robertson, Mr. Craig T. Merritt, Ms. Jennifer A. Albert, and Mr. Michael G. Strapp represent the plaintiff.

Mr. Daniel W. McDonald, Mr. Dabney J. Carr, IV, Ms. Kirstin L. Stoll-DeBell, Mr. William D. Schultz represent the defendants. Are counsel ready to proceed?

MR. ROBERTSON: Yes, Your Honor.

MR. McDONALD: We are, Your Honor.

THE COURT: All right. What is this all about?

MR. ROBERTSON: Your Honor, good morning.

THE COURT: Morning.

MR. ROBERTSON: Last night at 6:00 p.m., plaintiff received a package of something like almost 170 demonstrative graphics that the defendant intends to introduce, apparently, with the testimony of Dr. Shamos.

As a practical matter, Your Honor, I think last week the defendant represented that they would wrap their case up in two days. Going through 170 slides is just going to be impossible to try to get through just as an initial matter before we even get to the issue that we have with respect to 170 slides being presented to the jury.

THE COURT: Why are these exchanges being made now?

1 I thought demonstrative exhibits were supposed to have been  
2 exchanged before the trial. Isn't that what the pretrial order  
3 says?

4 MR. ROBERTSON: I'm not certain the pretrial order  
5 says that or not. We did have an agreement among the parties  
6 that we would present demonstratives at 6:00 p.m. the night  
7 before a witness was to go on, but the sheer volume --

8 THE COURT: Did I say grace over that?

9 MR. ROBERTSON: I'm sorry, sir?

10 THE COURT: Did somebody present that to me?

11 MR. ROBERTSON: I don't know that it was presented to  
12 you, Your Honor.

13 THE COURT: You see what happens? I would never have  
14 allowed that if I knew that was what was going on. Never in a  
15 million years would I have allowed it. I've never allowed it,  
16 and the reason I don't allow it is because of this kind of  
17 problem.

18 MR. ROBERTSON: There had been a rule of reason  
19 applied to it, Your Honor, where the demonstratives were fairly  
20 limited in scope. For example, Dr. Weaver, I think we had  
21 about 30 of which 24 were simply the claims or the -- you'll  
22 recall the infringement charts where we were checking off the  
23 boxes.

24 The problem we have now is we believe that these  
25 slides substantively violate several of the Court's orders with

1 respect to limitations on the testimony of Dr. Shamos. Let me  
2 just give what I think is one --

3 THE COURT: I've got a copy of an email from Mr.  
4 Strapp to Ms. Stoll-DeBell, and it's got eight bullet points.  
5 Does that cover it?

6 MR. ROBERTSON: I think that's a good summary. I  
7 could get down in the weeds and give you some specific  
8 examples. I mean, just one, there are 50 slides, Your Honor,  
9 on a combination of J-CON and PO Writer to render the claims  
10 obvious. There's one paragraph in Dr. Shamos's report,  
11 paragraph 236, in a conclusory fashion that addresses that  
12 combination.

13 THE COURT: That's all he can testify to.

14 MR. ROBERTSON: But, yet, he has 50 slides. There's  
15 going to be a number of examples. Your Honor, I'm happy, as we  
16 go along, because we did stay up until the wee hours of the  
17 morning trying to go through and map out all of our objections  
18 consistent with the Court's prior rulings on the second  
19 supplemental statement, the limitations he has.

20 He's now tried to go back and incorporate -- you will  
21 recall they wanted to swap out Dr. Shamos with Dr. Staats, and  
22 we had a motion on that. There were several examples where Dr.  
23 Staats' opinions from the report that you struck have now  
24 migrated into Dr. Shamos's opinions and find themselves in  
25 slides in this presentation. So I want to do what's realistic

1 and practical for the Court, but as these slides come up --

2 THE COURT: I'm not going to do that. There's no way  
3 on earth I'm going to do that. I'm not putting this jury  
4 through that. Let me -- have you submitted -- before I get  
5 into another contempt situation.

6 Have you submitted these emails -- have you talked  
7 about the emails since the one that arrived at 8:24 a.m. today  
8 in the --

9 MR. ROBERTSON: We have not -- I'm sorry.

10 THE COURT: -- with the other side?

11 MR. ROBERTSON: We have not really had an  
12 opportunity, Your Honor. We were up until, literally, this  
13 morning trying to go through these slides and identify whether  
14 they were in the record, out of the report, whatever. About  
15 ten minutes ago, Mr. McDonald handed me an annotated version of  
16 these 167 slides where he represents he believes that there was  
17 support for a lot of these contentions.

18 I haven't had a chance to even look at it. It's been  
19 ten minutes ago. One of my colleagues is looking at it right  
20 now. Already we found what we think are substantial issues  
21 with their representations. For example, there might be an  
22 exhibit cited in Dr. Shamos's report but not specific pages or  
23 slides or things like that which is what the Court required,  
24 and we're also finding out that some of the specifics that were  
25 in Dr. Staats' reports, as I say, now find their way into Dr.

1 Shamos's report. We just weren't put on notice as to that.

2 THE COURT: Were those things not in Shamos's report?

3 MR. ROBERTSON: That's right, sir. This came up with  
4 respect to Dr. Weaver at one point. We had -- Dr. Weaver was  
5 going to testify about a handful of documents, perhaps six, and  
6 Ms. Stoll-DeBell brought to my attention that although he had  
7 relied on them and cited them in his report, he didn't have  
8 specific paragraphs that were addressing those.

9 I immediately withdrew those six exhibits and told  
10 her I was not going to be offering them because they weren't in  
11 the report. Under the ruling, I think Your Honor identified  
12 last week what's sauce for the goose, sauce for the gander. We  
13 think that applies here.

14 I don't know how possibly we're going to get through  
15 170 slides with Dr. Shamos. This is going to take several days  
16 to do this, and then we're going to have to cross-examine him  
17 on each one of these slides, because I think a lot of them are  
18 not in his report, not supported, don't stand for the opinions.

19 As I say, 50 slides on J-Con, plus PO Writer, and he  
20 has one paragraph in his report. I mean, that's just beyond  
21 the pale. Thank you, Your Honor.

22 THE COURT: I'm going -- do you have a -- this is --  
23 what is the term you all are fond of using? You are presenting  
24 these things to me at a high level. I don't have any specifics  
25 in front of me, but I told you that Dr. Shamos is not going to

1 testify about anything that's not in his report.

2 I don't know why you would even prepare these slides.  
3 Why did you come with 167 slides, Mr. McDonald? You know  
4 that's not going to fly.

5 MR. McDONALD: Well, we've got a tremendous burden --

6 THE COURT: Yes. I'll tell you what burden you have.  
7 Here's the burden you have. I'm going to give you some time to  
8 straighten this out or your invalidity defense will be  
9 stricken. That's the burden you have. I am not putting the  
10 jury -- I can't believe you did that to the other side.

11 You came in here and pleaded for a day off because  
12 you are running on fumes, and yet you give them something at  
13 six o'clock that you know is going to take hours to review.  
14 Now, what on earth is going on?

15 MR. McDONALD: Well, I think we're going to try to  
16 streamline it, Your Honor. I think the RIMS plus TV/2 is the  
17 main issue. That's what we're going to spend the most time  
18 with Mr. Shamos on. That's not what's been the issue. I think  
19 there are too many slides on the PO Writer, and that's at the  
20 end of his testimony here on the invalidity.

21 THE COURT: Does he have one paragraph in the report?

22 MR. McDONALD: No, that's not the issue there, Your  
23 Honor. What they're trying to say is -- this was the issue  
24 that was argued before Your Honor back on December 30th when we  
25 had a hearing, very similar issue anywhere, where they were



1     trying to say, well -- I think it was on a different  
2     combination of prior art that was the subject of their motion  
3     at that point, but they were saying, well, you've got a  
4     combination of two references.

5             We went through in detail, element by element, to go  
6     through reference number one, detail element by element for  
7     reference number two, and they were saying, yes, but when you  
8     actually combine them, you didn't repeat the exact same element  
9     by element detail again. You just used the anticipation  
10    element by element analysis.

11            So we showed you that that was totally appropriate,  
12    and they understood exactly that's what we were doing when they  
13    deposed Mr. Shamos, that we were combining them. That's the  
14    issue. The details are in there. We just didn't repeat every  
15    word of it. You talk about overburdening things and having too  
16    much paperwork, well, we have done the exact -- simply repeated  
17    the analysis for the combination of two --

18            THE COURT: I think I may have erred in the ruling.

19            MR. McDONALD: Pardon?

20            THE COURT: I think I may have erred in making that  
21    ruling. I was very troubled at the time, but I felt as if I  
22    did the right thing, but I may have erred. Let's say it's more  
23    than 100 of Lawson's slide make a claim by claim, element by  
24    element analysis of how the RIMS and TV/2 combination and the  
25    PO Writer and J-Con combination rendered the asserted claims

1 obvious. That analysis was never disclosed in Dr. Shamos's  
2 report.

3 MR. McDONALD: That's totally untrue, Your Honor, and  
4 I've got a copy of the slides here along with the report and  
5 the attached appendixes with the detailed analysis element by  
6 element, and every one of the slides now we've annotated, as  
7 Mr. Robertson indicated, and, again, for us in the wee hours to  
8 go through and get this done by this morning.

9 Each slide now shows you the paragraphs where Dr.  
10 Shamos talked about that or the cells where he did the specific  
11 element by element comparison, and if I may, I'd like to hand  
12 that up to the Court so you have a copy of the slides as well  
13 as the supporting documents here that they referred to.

14 And I think what makes sense -- because RIMS plus  
15 TV/2, Your Honor, that's been a very straightforward story all  
16 along, and ePlus has never filed any motions with respect to  
17 either our interrogatory answers or Dr. Shamos's report that  
18 says --

19 THE COURT: I'm dealing with what's in this email  
20 that's in front of me. It says several things. I'm going to  
21 attach it and consider it as part of -- what I'd like to know  
22 is what do you want me to do, Mr. Robertson? What relief are  
23 you seeking; to strike all of these things that you mention in  
24 this email or what?

25 Realize that I need to be confronted with a decision,

1 know what is it, hear the argument on it, and then decide.

2 MR. ROBERTSON: I understand, Your Honor. I find  
3 myself in a real dilemma and a real conundrum, because we've  
4 gone through these things. We think a number of them are not  
5 fair.

6 As Your Honor pointed out when you had the discussion  
7 before about what Dr. Shamos can testify or not, all -- the  
8 Court observed, correctly I think, it contains nothing but  
9 anticipation themes. He doesn't talk about the combinations  
10 being obvious.

11 This kind of RIMS and TV/2 was disclosed. We've gone  
12 through. There's a number of things now that Dr. Shamos is  
13 relying upon within the RIMS patent, for example, that they  
14 didn't disclose in his expert report. I had my team go through  
15 these 167 slides last night, and on the opposite page of each  
16 one, I feel we have what would be an objection or a position  
17 that we would take that is not disclosed. I don't know how to  
18 do it, Your Honor, given the fact --

19 THE COURT: What do you want me to do?

20 MR. ROBERTSON: I'd like to strike these slides and  
21 just have Dr. Shamos testify based on his report. That's what  
22 I think would be appropriate given the circumstances we find  
23 ourselves in now. 50 slides on J-Con and PO Writer when he  
24 only has paragraph 236 addressing it, that's a problem.

25 The other backsliding we had, Your Honor, I wanted to

1 bring to the Court's attention is in his chart, the Court, in  
2 the second *motion in limine* to -- excuse me, in the order to  
3 enforce *motion in limine* number two about that Dr. Shamos could  
4 only reply in his expert opinion on those things that were set  
5 forth in the second supplemental statement, he has now back  
6 slid into the interrogatory answers that the Court found to be  
7 inadequate -- that's why you ordered the second supplemental  
8 statement -- and then once he had circumscribed that further in  
9 his expert report, you limited him to his expert report, he's  
10 now slid back to relying on things that weren't in his expert  
11 report --

12 THE COURT: That were not in his expert report?

13 MR. ROBERTSON: That were not in his expert report  
14 but he says were in his second supplemental statement. That's  
15 not what the Court said. The Court said, if it was in the  
16 second supplemental statement, you can do it, but once he did  
17 an expert report, he even disclaimed some of the things in the  
18 second supplemental statement and said that he disagreed with  
19 those opinions and he was going to rely on his opinions.

20 Now what we've had is this backsliding both to the  
21 second supplemental and to the interrogatories. So, I mean, it  
22 has been very difficult to try to get our arms wrapped around  
23 this in the short period of time that we've had.

24 THE COURT: I have five slides that contain  
25 invalidity opinions that the Court already specifically struck.

1 Is there anywhere I can verify any of these things?

2 MR. ROBERTSON: Your Honor, I have prepared, for  
3 example, this is --

4 THE COURT: Have you given that to Mr. McDonald  
5 before?

6 MR. McDONALD: We never got this specific --

7 THE COURT: All right, here's what I'm going to do.  
8 We're going -- you're going on -- well, listen. Don't worry  
9 about the fact you haven't gotten it. You didn't give it to  
10 him until six o'clock last night. What did you expect? I  
11 think they've done pretty well considering when you gave it to  
12 them.

13 Dr. Shamos is not going to testify until I get this  
14 sorted out. Get the rest of your case on and put some people  
15 back in there to work talking this out and let me see where it  
16 goes. I have a motion to strike all of these proffered slides  
17 and confine his report explicitly -- his testimony to what he  
18 said in the report, and I can do that, and I'm inclined to do  
19 it, but I want to see if I can get it sorted out.

20 Let me tell you how I sense this. It's been a  
21 running situation throughout this litigation, and you all have  
22 to understand something. When a Court makes a ruling, you have  
23 to live by it whether you like it or not. The Federal Circuit  
24 is there, and if I did wrong, I'm sure they'll feel free to  
25 tell me. And that's the way it works. And it is all right, in

1 my view, to read what a Court said and see if there's anything  
2 else in the record that will allow you, within the rules, to do  
3 other things that may have dealt with the topic that was a  
4 Court ruling, but it is not all right to do what I've seen done  
5 here, and that is attempt to evade the rulings, and I don't  
6 like it, I don't like spending time on it, and I'm at the point  
7 now in the middle of the trial where the remedy is going to be  
8 that Dr. Shamos simply will not testify about any of the  
9 matters that are in contest if you all -- but I want to give  
10 you all a chance to work them out and to see if maybe you all  
11 can spend some protective time doing that.

12 So you dispatch whoever you need to dispatch -- Mr.  
13 Robertson, you do the same thing -- to go talk about it. You  
14 all, I take it, have both crystalized your positions  
15 sufficiently from the things that you've said here this morning  
16 that you can work them out. In the meantime, put on the rest  
17 of your case, and we'll see where Dr. Shamos comes out. He may  
18 or may not be testifying. He may be testifying about some  
19 things but not others.

20 I'm not going to hold the jury up. We don't do  
21 things like that. I didn't know you had this protocol. I  
22 would never have approved this protocol. The very purpose of  
23 having all these things out at the final pretrial conference  
24 stage is so that if there are objections to them, they can be  
25 worked out, sorted out, and straightened out.

1           If I -- does anybody contend that you all informed me  
2   you were going to be doing this? Is this something --

3           MR. McDONALD: I don't think, sir. We had worked it  
4   out before trial and we've been obviously working with that in  
5   terms of the ePlus experts. We've been getting their slides --

6           THE COURT: It worked fine --

7           MR. McDONALD: It worked as well as we could make it  
8   work. We didn't have a lot of time to look at their slides  
9   either and work through the issues, but we've been playing by  
10  those rules.

11          THE COURT: What is the most they ever gave you?

12          MR. McDONALD: I think it was about 50 or so.

13          THE COURT: You three-times-ed that, and in an area  
14  where I have found it necessary, because of the violations of  
15  Court orders on the part of Lawson, to circumscribe and make  
16  rulings circumscribing what Dr. Shamos could testify about and  
17  striking part of his report or the areas on which he can  
18  testify about, and so when it is presented to me in this kind  
19  of form, I need to pay attention to it and have it resolved.

20          In the past when ePlus has made these claims and I  
21  have had the time to go through them and review them, for the  
22  most part I have found that Dr. Shamos's efforts have been  
23  properly criticized by ePlus, and they have been not in  
24  conformance with the rulings of the Court. And I don't have  
25  time to do that at this time, but given that history, I feel

1 obligated to take some action. I don't think that makes sense.  
2 I don't think they are crying wolf or posturing. I think this  
3 is a real problem here, Mr. McDonald.

4 MR. McDONALD: We've tried to be very sensitive to  
5 the Court rulings, and that's why we put together and how we  
6 put together this annotated set for Your Honor, but I  
7 understand if you need more time. Our next --

8 THE COURT: No, you all need more time, and the last  
9 guy you're going to put on is Dr. Shamos. We're going to  
10 finish the rest of your case.

11 MR. McDONALD: The next witness we were going to call  
12 is Mr. Momyer, one of the inventors listed on the patent. Is  
13 he available?

14 MR. ROBERTSON: I anticipated Your Honor might rule  
15 in this manner, and I told Mr. Momyer that he needed to have  
16 himself prepared to be over here, so he is ready to go, but we  
17 would have to email him back the hotel and get him over here  
18 forthwith, and I can do that.

19 THE COURT: Have you got other witnesses besides  
20 Momyer?

21 MR. McDONALD: Mr. Momyer. Lined up the next witness  
22 is going --

23 THE COURT: Who is the next one?

24 MR. McDONALD: -- Mr. Staats. He's here.

25 THE COURT: Is Staats here.



1 MR. ROBERTSON: The next witness --

2 THE COURT: Wait a minute. Quit talking at the same  
3 time.

4 MR. McDONALD: Kinross is the next witness after  
5 Momyer.

6 THE COURT: Is Kinross here?

7 MR. ROBERTSON: Yes, he is.

8 THE COURT: Put Kinross on and email --

9 MR. ROBERTSON: I apologize. He's here at the hotel.  
10 Mr. Momyer is ready, dressed in a suit, to come over here and  
11 start.

12 THE COURT: Get him dressed -- okay, here's the next  
13 thing. Have all of the rest of your witnesses that are in this  
14 case from now on with their clothes on, dressed, out there.  
15 I'm not going to be held up by this.

16 I have been through 20-some years on the bench and a  
17 good bit before that doing what you are doing, and I have never  
18 seen this kind of thing happen, and I'm distressed that we are  
19 imposing on the time of these citizens to do things that should  
20 have been done a long time ago. All right. Now, how many  
21 witnesses have you got today? Let's see, you have Momyer and  
22 Kinross and who?

23 MR. McDONALD: Mr. Staats.

24 THE COURT: All right, Staats.

25 MS. STOLL-DeBELL: I think it was Momyer, Kinross,

1 Gounaris.

2 MR. McDONALD: That's right, Gounaris, Mr. Kinross,  
3 Mr. Gounaris.

4 MS. STOLL-DeBELL: Then I think it's the McEneny  
5 deposition, and then I think Staats.

6 MR. ROBERTSON: Actually you also had Mr. Johnson who  
7 is one of the inventors.

8 MR. McDONALD: He is not available today.

9 MR. ROBERTSON: When did he arrive? He's arriving  
10 today.

11 THE COURT: You've got witnesses, you get them going.  
12 Do you have anybody here in court?

13 MR. ROBERTSON: We've emailed Mr. Momyer and told him  
14 to come over here straightaway.

15 THE COURT: I want you to dispatch somebody who knows  
16 what they're doing about this case on each side to work through  
17 these objections. I don't want 167 slides. I don't want him  
18 testifying about things that Staats testified to that he didn't  
19 testify to.

20 If that happens -- and I'm going to tell you the  
21 first time -- here's the way I'm going to resolve this: I  
22 don't have the leeway to do what I would take the time that you  
23 all might want me to take, because you have a jury sitting in  
24 the box, and we've kept them here for two weeks already, and we  
25 don't do things this way. This is a monument to how you can

1 foul up a jury trial. But if that man gets his foot off the  
2 base after this conference, if after that conference he gets  
3 his foot off the base and I sustain an objection because he's  
4 testifying to something that is not in the report, that is the  
5 last word that will come out of his mouth, and I mean that,  
6 because you can't expect a jury to sit through the process of  
7 objection and resolution question by question and not be  
8 utterly and totally confused.

9 So I'm not going to do it that way. That's not right  
10 to the jury in a case like this, nor can you send them out like  
11 the Lance Ito in-and-out process that went on in the O.J.  
12 Simpson trial. It belittles them, it confuses them, and it  
13 wastes their time. I'm not going to do that. And you all have  
14 had plenty of time to get ready for this case. When were these  
15 demonstratives prepared? Did Shamos prepare them?

16 MR. McDONALD: Yes.

17 THE COURT: When did he prepare them?

18 MR. McDONALD: Over the weekend we were going over  
19 them with him --

20 THE COURT: No. When did he prepare them?

21 MR. McDONALD: I'm not sure when the invalidity ones  
22 were prepared. We had focused on the infringement ones because  
23 that is what he was testifying about on Friday, and then we  
24 shifted gears --

25 THE COURT: You find out when he prepared them. That

1 will be important to know. I want to know when he did them and  
2 when he gave them to you the first time.

3 MR. McDONALD: The PO Writer ones I know were  
4 actually very recent, since Sunday --

5 THE COURT: I want the dates.

6 MR. ROBERTSON: I'm sorry, since Sunday?

7 THE COURT: Now, I guess we have to take a recess  
8 until the witnesses get here. We'll take a recess. In the  
9 meantime, get somebody started and get it solved. Then I'll  
10 know the ones that I have to rule on, what's left.

11  
12 (Recess taken.)  
13

14 THE COURT: All right. I have a trial brief  
15 regarding the identity of element 40 and figure 1A of the  
16 patents-in-suit. Mr. Robertson, what do you have to say about  
17 that? I've read their trial brief. I know what they say. I  
18 don't have one from you. It wasn't filed, so I'll just hear  
19 what you have to say orally.

20 MR. ROBERTSON: I appreciate that, Your Honor. I  
21 will tell you I received this morning, I think at 8:30. I  
22 briefly scanned it. The testimony is been consistent that the  
23 RIMS was modified, that there needed to be several changes in  
24 order for the kind of requisitioning and purchasing  
25 capabilities that were in RIMS that were not in the electronic

1 sourcing system.

2           What they used, and as the Court has seen and the  
3 Court itself has observed on several occasions, is they said,  
4 you can use some of these requisition and purchasing order  
5 systems, and you can use Fisher RIMS preferably but not  
6 necessarily.

7           The patent then goes through in detail a number of  
8 things that need to be modified from the RIMS systems that the  
9 inventors have testified. You need to be able to have multiple  
10 catalogs. We only had the Fisher catalogs with respect to the  
11 RIMS system. You needed to be able to generate multiple purchase  
12 orders to all those vendors. You need to have all the  
13 communication protocols. You need to be able to select the  
14 multiple catalogs that were not in the RIMS system.

15           So, of course, you know, the argument that's being  
16 made that RIMS fully anticipates, that's one of the  
17 arguments --

18           THE COURT: But what they're arguing is they ought to  
19 be allowed leeway to explain -- to talk to Dr. Momyer, for  
20 example, and cross-examine him and show that he's wrong. Why  
21 shouldn't they be allowed to do that?

22           MR. ROBERTSON: Well -- they can ask Mr. Momyer about  
23 what his understanding is about figure four. They asked him  
24 that in direct examination.

25           THE COURT: I thought they did. I thought that's

1 where it came from.

2 MR. ROBERTSON: In fact -- so I think what they want  
3 to do now is they were unhappy with their cross-examination.  
4 Two weeks have gone by, and they want to revisit the issue.  
5 Quite frankly, I think that would be cumulative testimony, and  
6 I think it was fully within the scope of his direct, and it was  
7 fully within Mr. McDonald's ability to cross-examine him on it.

8 I mean, we're not calling these inventors back, I  
9 didn't understand, to just go over things they testified to two  
10 weeks ago.

11 THE COURT: I only recall once, and I can't even  
12 remember who it was with, dealing with this situation involving  
13 the short form abbreviation of Fisher RIMS and RIMS in  
14 connection with figure 40. Was there more than one time that  
15 happened?

16 MR. McDONALD: That's the transcript, I think, that  
17 we presented in our brief was there was an interchange at that  
18 point where you said you can come back and talk about that  
19 later. ePlus knows you're going to do it. If they want to  
20 brief it to stop you, they can. So that's what kind of brought  
21 it to a halt, obviously, as an issue --

22 THE COURT: You're going to bring it on now in your  
23 case. What I had thought we were doing was that you were going  
24 to be doing what you were going to be doing in your case so the  
25 context would be that you were leading the examination.

1 MR. McDONALD: Right.

2 THE COURT: I mean were handling the examination in  
3 the first instance, so I didn't envision you couldn't ever talk  
4 about it. It was the context in which you talked about it. So  
5 I think it's fine depending upon the question you ask. I think  
6 you can. You are entitled to show a witness is wrong if you  
7 can. All right, are we ready -- is it Mr. Momyer, Dr. Momyer?

8 MR. McDONALD: Mr. Momyer, I believe.

9 THE COURT: What is the legal assistant's name?

10 MR. McDONALD: Maggie? Ms. Martinez.

11 THE COURT: Ms. Martinez, I have a whole bunch of  
12 these notebooks up here that I would like to get out of here so  
13 I can store what's being thrown at me. Can I get you to come  
14 get them?

15 MS. MARTINEZ: Absolutely.

16 THE COURT: Get some help. Bring some help up here.

17 MR. CARR: Your Honor, these two big ones right here  
18 are for the next witness.

19 THE COURT: I know. That's what I'm making room for.  
20 Ms. Martinez, thank you very much, and I continue to thank you,  
21 both paralegals for their work here. I know full well it is a  
22 difficult assignment.

23 MS. MARTINEZ: You're welcome, Your Honor.

24 THE COURT: Are we ready with Dr. Momyer?

25 MR. McDONALD: Mr. Momyer. I saw him and then --

1 THE COURT: Yes, we're ready for the jury. Is this a  
2 two-volume work I get to study this morning, or is it two  
3 copies of the same thing?

4 MR. McDONALD: That is the exhibits and the  
5 transcripts, Your Honor. Actually this should work for all  
6 three of the inventors, this set of materials. We weren't  
7 going to make extra copies for each one.

8 THE COURT: Okay.

9  
10 (Jury in.)

11  
12 THE COURT: Good morning, ladies and gentlemen.

13  
14 **DOUGLAS R. MOMYER,**  
15 a witness, called by the defendant, having been first duly  
16 sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. McDONALD:

19 Q Good morning, Mr. Momyer.

20 A Good morning.

21 Q I'd like to start first by just talking to you about what  
22 you actually invented here.

23 THE CLERK: Can we get him to state his name for the  
24 record.

25 MR. McDONALD: Oh, I'm sorry.



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1 Q Could you restate your name for the record, Mr. Momyer.

2 A Douglas Momyer.

3 Q And you've already testified earlier in this trial;  
4 correct?

5 A Yes, I have.

6 Q Mr. Momyer, I'd like to start with talking to you about  
7 what it is that was real -- what you thought was the invention  
8 that's described in the patents involved in this case, all  
9 right?

10 A Do you want a description?

11 Q I'm just getting on the same page here; okay?

12 A Okay.

13 Q Would you agree that before you came up with the invention  
14 in these patents, there were known requisition and purchasing  
15 systems?

16 A Yes.

17 Q They could build requisitions as a result of searching for  
18 part numbers; right?

19 A Yes.

20 Q They could take those requisitions and generate purchase  
21 orders out of those requisitions; right?

22 A A single purchase order.

23 Q We'll talk about that issue in a little bit. But at least  
24 you would agree a purchase order could be generated from a  
25 requisitions in the old systems; right?

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1 A Correct.

2 Q Would you agree that it was also old to be able to search  
3 a database of -- containing a product catalog of a particular  
4 vendor, for example, on a CD-ROM?

5 A Be able to search a particular vendor's catalog on a  
6 CD-ROM, yes.

7 Q That was old; right?

8 A Yes.

9 Q You could search those old CD-ROMs for the purpose of  
10 picking out a product that you might want to buy; right?

11 A I don't know -- I'm not sure that there were any products  
12 that I was aware of that actually turned around and pulled that  
13 product out and actually created an order directly.

14 Q I didn't talk about creating an order?

15 A You said buy. To me, that's kind of inclusion of the  
16 transaction, is you pick an item --

17 THE COURT: He interpreted the word buy in your  
18 question to mean purchase which connotes a purchase order; is  
19 that what you are saying?

20 THE WITNESS: That's correct.

21 Q Would you agree that the systems that could look at a  
22 single catalog could search for user-requested information  
23 about products and create orders which the user could save,  
24 print, or fax to a vendor?

25 A Save, print, or fax, yes.

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1 Q So that single catalog on a CD-ROM system could be used to  
2 create orders to buy products; right?

3 A Not directly from that system. At least my understanding.

4 Q Do you have the binders there? I think there's a couple  
5 of big binders. Go to volume one.

6 A Okay.

7 Q Go to PX-1. That's the '683 patent?

8 A Yes.

9 THE COURT: That's in your book, ladies and  
10 gentlemen, at tab two.

11 A I see DX-5.

12 Q We're just looking at PX-1.

13 A Oh, PX, I'm sorry.

14 Q That should be in your volume there.

15 A I got it.

16 THE COURT: It's PX, in your book, 0001; do you see  
17 that, sir?

18 THE WITNESS: I've got it. Thank you.

19 Q You understand that's one of the patents involved in this  
20 lawsuit; right?

21 A Yes.

22 Q Could you turn to column two of the patent, please, past  
23 the figures.

24 A Excuse me for squinting here. Okay. I have it.

25 MR. McDONALD: Bill, can you blow up the upper left,

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1 about the first ten lines or so of column two. I said upper  
2 left, didn't I? I meant upper right. I'm sorry.

3 Q Now, this patent, you actually reviewed this application  
4 that led to the three patents-in-suit; right, Mr. Momyer?

5 A Yes, I did.

6 Q And you did sign an oath and declaration saying you had  
7 reviewed it and it was accurate as far as you knew; correct?

8 A At the time the patent was filed, yes.

9 Q And that declaration includes statements that you've  
10 reviewed the claims as well; right?

11 A That's correct.

12 Q And that you believe that what was described in the patent  
13 as claimed was the thing that you considered to be your  
14 invention; right?

15 A Yes.

16 Q And you also put in that declaration that you were aware  
17 of your duty to disclose prior art; right?

18 A Yes, although I haven't seen a copy of that declaration in  
19 a while, but, yes, I did sign a declaration.

20 Q Well, does that ring a bell, though, that the declaration  
21 specifically acknowledged your duty to disclose information  
22 that would be relevant or material to the Patent Office?

23 A Yes.

24 Q So if we go up to this line beginning at -- the paragraph,  
25 excuse me, of column two, line three, of the '683 patent?

1 A Yes.

2 Q Do you see there about -- actually the second sentence of  
3 that paragraph -- well, we'll start with the first sentence  
4 just to make sure we have the context here. It says, computer  
5 systems that are capable of searching databases containing a  
6 product catalog of a particular vendor, for example on CD-ROM,  
7 are also known. Do you see that sentence?

8 A Yes, I do.

9 Q By saying it was also known, were you acknowledging in  
10 effect I'm not trying to get a patent on a system that is  
11 capable of searching databases containing a product catalog of  
12 a particular vendor?

13 A Yes.

14 Q All right. Then you go on the next sentence to say, such  
15 systems can search for user-requested information about  
16 products and create orders which the user can save, print, or,  
17 in some cases, facsimile directly to a vendor; do you see that?

18 A Yes, I do.

19 Q So you did believe it was true at the time you filed the  
20 application and still today believe it's true that there were  
21 such systems that worked with a product catalog of a particular  
22 vendor; right?

23 A Yes.

24 THE COURT: He answered that earlier. He said that  
25 it could be used to a create orders to be faxed, saved, or

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1 printed. We didn't need to go through all that. He already  
2 agreed to that.

3 Q You view that as different from your invention because it  
4 was just one vendor catalog; is that right?

5 A Well, it's a little more than that. It's multiple  
6 catalogs, be able to search across those multiple catalogs,  
7 select an item, move it into an order list, place on a  
8 requisition, be able to create multiple purchase orders, not an  
9 order to a single vendor, although I don't think in that system  
10 we -- how I read that system doesn't really say an order. It's  
11 creating an order with a -- directly with a supplier there. I  
12 see where it creates --

13 THE COURT: You mean the old system.

14 THE WITNESS: The old system creates an order, save,  
15 print, or in some cases, facsimile directly to a vendor in  
16 which case they'll take that and enter it into their system.

17 THE COURT: "They" meaning the vendor.

18 THE WITNESS: Yes. That is a different than what  
19 I -- our patent was claiming.

20 Q Well, in any event, you are talking about a single vendor  
21 product catalog, and that's at least one of the reasons you  
22 were distinguishing that particular system as you described in  
23 column two; right?

24 A Yes.

25 Q Now, with a catalog a CD-ROM, for example, of a vendor,

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1 that could be have products from multiple sources in it; right?

2 A Multiple sources, you mean multiple vendors?

3 Q Multiple sources for the vendor to get those products.

4 THE COURT: Are you talking about the one that's  
5 referred to in the preceding sentence?

6 MR. McDONALD: Yes. This one here in the first  
7 paragraph of column two, for a product catalog of a particular  
8 vendor.

9 THE COURT: So could a product catalog of a  
10 particular vendor in that system have products from other  
11 vendors?

12 MR. McDONALD: Other sources, other manufacturers and  
13 places where that vendor could get products.

14 A Not if it was a vendor. If it was a distributor, you  
15 might be able to do that.

16 Q Well, I thought you were talking about a faxed purchase  
17 order directly to a vendor, and you made it sound like that  
18 wasn't, for some reason, a real purchase order. Can you  
19 explain to me what --

20 THE COURT: He didn't say that, Mr. McDonald. You  
21 need to pay -- I think the problem is you're not listening.  
22 What he said is, what's described in this sentence can print --  
23 can create a purchase order. It is then saved or it is  
24 printed, and then it could be, in some instances, facsimiled  
25 directly to a vendor, but that wasn't the same thing as using

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1 the computer to send it directly to the vendor. I think that's  
2 what he said; is that right?

3 THE WITNESS: Yes. Thank you.

4 THE COURT: I think he said it now at least twice, so  
5 let's pay attention.

6 Q Well, that system with what you call the single product  
7 catalog of a particular vendor, for example, that could be a  
8 store like an Office Depot; right?

9 A Yes.

10 Q But they could have products that came from computer  
11 companies like Dell and HP or Post-it Notes from 3M; right?

12 A Yes, they could.

13 Q Now, in those cases, would you consider that actually  
14 multiple catalogs because there could be multiple  
15 manufacturers?

16 A No, I wouldn't consider it multiple catalogs.

17 Q Now, there might be products in that catalog that might be  
18 described according to color or other characteristics; right?

19 A Yes.

20 Q Would the fact that you could search that single CD-ROM  
21 for products of a certain color, would that mean that CD-ROM  
22 actually contains multiple catalogs depending on what word you  
23 search with?

24 A It would be -- to me, the catalog would indicate the  
25 company you were buying the product from. So if -- to me, it



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1 would not -- if I were buying a Post-it Note from Office Depot,  
2 it's a 3M Post-it, so it would be a single catalog.

3 Q So even though you could do keyword searches and look up  
4 all sorts of different words within that catalog, it's still,  
5 as you understood it for the purposes of your patent, a single  
6 catalog; right?

7 A Yes.

8 Q I'd like to turn now to the issue of selecting catalogs to  
9 search. You would agree, wouldn't you, that part of your  
10 patent talks about being able to select particular catalogs to  
11 search?

12 A Yes.

13 Q And, in fact, if we go up to page or column nine of the  
14 '683 patent that we just were looking at, in the lower left  
15 corner...

16 A Yes, I see that.

17 Q If we could blow up about the bottom quarter of column  
18 nine, please.

19 THE COURT: When multiple?

20 MR. McDONALD: Yes.

21 THE COURT: Begins when multiple.

22 Q Do you see what's up on the screen now, Mr. Momyer,  
23 beginning at line 52 of column nine of the '683 patent?

24 A Yes.

25 Q That's the part of your patent where you actually describe

1 this process or function of being able to select particular  
2 catalogs to search; correct?

3 A Correct.

4 Q Now, in your description here, you gave a list, a menu, in  
5 effect, of catalogs that are available for the user; correct?

6 A Yes.

7 Q And then you give that user the option to select which  
8 catalogs they're going to search; right?

9 A Yes.

10 Q And you do that because you want to give the user the  
11 option of limiting the search to exclude catalogs that the user  
12 knows they don't want to look in; right?

13 A That's correct.

14 Q And another reason for that is that it doesn't bog down  
15 the system searching through catalogs that are unnecessary to  
16 search for if you know the products are only in one or two  
17 particular catalogs; right?

18 A That's correct.

19 Q Now we'll move on. If we go back now to the RIMS system,  
20 remember, I think we talked a little bit about the RIMS system  
21 back in your earlier testimony?

22 A Yes.

23 Q Now, the RIMS system, that was a precursor to the systems  
24 in the patent, claim in the patents-in-suit; right?

25 MR. ROBERTSON: Objection to the form of the

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1 question. I think precursor is vague and ambiguous.

2 THE COURT: Well, I don't know -- I think you can be  
3 a little bit more precise, Mr. McDonald.

4 Q There was -- the RIMS system had an embodiment that  
5 existed as of April of 1993; correct?

6 A Is that when that patent --

7 Q If that would help you, we can go to that -- I think you  
8 have either Plaintiff's Exhibit 10 or Defendant's Exhibit 7.

9 THE COURT: Is that the patent on RIMS?

10 MR. McDONALD: That is the RIMS patent, the '989  
11 patent, yes.

12 THE COURT: Exhibit what now?

13 MR. McDONALD: Either Plaintiff's Exhibit 10 or  
14 Defendant's Exhibit 7.

15 THE COURT: They are not in either one of the  
16 notebooks he has.

17 THE WITNESS: They might be. The tab isn't there.

18 THE COURT: I don't see it -- PX-10 is the last one  
19 in the second notebook, Mr. Momyer.

20 THE WITNESS: Okay.

21 THE COURT: Is that what you want, PX-10?

22 MR. McDONALD: That's right.

23 THE COURT: The last one in that notebook.

24 MR. McDONALD: Close to the end, that's right.

25 THE WITNESS: Okay, I have it.

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1 Q If we can blow up the top half of the first page of PX-10,  
2 please. Do you see that now, Mr. Momyer?

3 A Yes, I do.

4 Q Now, that shows a filing date there on the left side of  
5 April 2nd, 1993; correct?

6 A Correct.

7 Q So this is capturing the RIMS system as it existed as of  
8 April of '93?

9 MR. ROBERTSON: Objection, Your Honor. There is no  
10 foundation to that. As the Court knows, this is a confidential  
11 application that's filed with the Patent Office as of April of  
12 1993. The witness has already testified that many of the  
13 features in this were never in a commercial embodiment.

14 MR. McDONALD: He's just testifying at this point,  
15 Your Honor. I'm just trying to ask him a question that this  
16 patent describes the version of RIMS as it existed in April of  
17 '93.

18 MR. ROBERTSON: What it describes is what was filed  
19 with the Patent Office in April of 1993, and it didn't become  
20 public until January of 1998 by definition.

21 MR. McDONALD: I didn't ask him whether it was public  
22 or not. I asked him if it existed.

23 THE COURT: How would he know? How would he know  
24 what it did in April of 1993, and the answer is that he was an  
25 inventor; right?

1 MR. McDONALD: Sure.

2 THE COURT: So did this describe what you understood  
3 was the RIMS system in April of 1993, I think is the question.  
4 The patent is dated 1998.

5 MR. McDONALD: That's the issuance date, right.

6 THE COURT: We all -- the record is clear that things  
7 happen between the time the application is filed and the date  
8 of issuance. That's in the video.

9 So the question is -- what he's really asking you, I  
10 guess, I don't know, is did things change in the RIMS system  
11 from 1993 when the application was filed until the date the  
12 patent was issued in June of 1998.

13 THE WITNESS: Yes.

14 MR. McDONALD: That wasn't my -- that's not my  
15 question, Your Honor.

16 THE COURT: Well, what is your question?

17 MR. McDONALD: I was asking about the system as it  
18 existed in April of 1993, because that's the system that would  
19 be prior art here.

20 THE COURT: So then go find the application and ask  
21 him about that, because he's made clear that changes occurred  
22 between April of 1993 and 1998 when it was issued. So it's  
23 fair to ask him what it was like in 1993, but use a document  
24 that was 1993.

25 Q Mr. Momyer, you didn't make any --

1 THE COURT: I'm going to sustain the objection to the  
2 question.

3 MR. McDONALD: Let me lay some more foundation.

4 Q Mr. Momyer, you didn't go, as the inventor on this RIMS  
5 patent, and actually add material to the patent after April of  
6 '93 when it was filed about later developments, did you?

7 A I didn't. I don't know if the attorneys did, but I didn't  
8 do anything.

9 Q Isn't it your understanding that when you file the  
10 application, that's what you are working from as you proceed  
11 forward from there to acquire your patent; you can't just keep  
12 adding new things along the way to the patent?

13 MR. ROBERTSON: Objection, lacks foundation.

14 MR. McDONALD: I'm asking for his understanding.

15 THE COURT: Overruled.

16 A There were -- I think we stated this earlier in my  
17 testimony, that what was outlined in this patent, there were  
18 things that, as of that date, that 1993, weren't in the  
19 existing RIMS system.

20 Q They were described in the patent but not in the existing  
21 RIMS system?

22 A It was the system that was operational in 1993.

23 Q Please let me finish my question. I want to make sure we  
24 get it clear. What you are saying is you did describe some  
25 things for a RIMS system in April of 1993 in the patent

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1 application that weren't actually implemented yet in the RIMS  
2 system that was on the market; is that right?

3 A That's correct.

4 Q But there was a RIMS system out in the market as of April  
5 of '93, wasn't there?

6 A Yes, there a was.

7 Q Isn't it true that RIMS development work that you were  
8 involved in was actually pretty much wrapped up by 1991?

9 A No, that's not true.

10 Q Can you turn to your September 2004 deposition,  
11 Mr. Momyer?

12 THE COURT: Which volume is that in?

13 MR. McDONALD: Volume one, I believe.

14 THE COURT: Remember how to do it.

15 THE WITNESS: What exhibit?

16 MR. McDONALD: September 2004 deposition transcript.

17 You should have some tabs in your volume number one. I think  
18 you might be in volume two right now. So we have to go back to  
19 volume one.

20 THE WITNESS: Okay.

21 THE COURT: September what date?

22 THE WITNESS: What is the tab on that?

23 THE COURT: They are all tabbed by name, your name,  
24 and then --

25 MR. McDONALD: September 16, 2004, I believe.

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1 THE WITNESS: Oh, I see it. Deposition of December  
2 what?

3 THE COURT: September 16th.

4 MR. McDONALD: 2004.

5 THE COURT: What page?

6 MR. McDONALD: Page 46.

7 THE WITNESS: I see 10/17/05.

8 MR. McDONALD: Your Honor, can I see if I can help  
9 him out?

10 THE WITNESS: I see it.

11 THE COURT: Page what?

12 MR. McDONALD: 46.

13 Q Do you have a page 46 before you now, Mr. Momyer?

14 A Yes.

15 Q Do you see beginning at line ten, were you asked -- this  
16 was a deposition where you have -- do you have page 46 now?

17 A Page 46, sorry.

18 Q This was a deposition where you swore to tell the truth;  
19 correct?

20 A I swore to tell the truth, yes.

21 Q And you did tell the truth in that deposition; correct?

22 A Yes.

23 Q Do you see there --

24 A To the best of my recall.

25 Q Do you see there beginning at line ten you were asked the



1 question, and how long did you work on the RIMS development  
2 effort, and you said several years? Then the question, through  
3 1993? And then your answer, early, we pretty much wrapped up  
4 the RIMS system early '90s. You were asked, can you be more  
5 specific than early '90s, and you answered '91; correct?

6 A Correct.

7 Q Thank you.

8 A Can I respond to that?

9 Q Well, I'll ask you some more questions about that, all  
10 right?

11 A The --

12 Q Mr. Momyer, you've answered the question. I'll ask you  
13 more questions about it, all right?

14 THE COURT: Mr. Momyer, Mr. Robertson will have a  
15 chance to ask you questions about that segment, and you can  
16 explain it then.

17 THE WITNESS: Thank you.

18 Q Would you agree that Fisher customers started using a RIMS  
19 system as described in the '989 patent by late 1992?

20 A I know we talked about. Those dates are kind of fuzzy to  
21 me, and I think I might have -- in the '92/'93 time frame is  
22 when we would have had customers using it.

23 Q Well, the difference between '92 and '93 could be kind of  
24 important here, so I'll ask you, Mr. Momyer, would you agree  
25 that 1992, late '92 was actually when the RIMS system, as

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1 described in the patent, was actually being first sold to  
2 customers?

3 A First of all, it wasn't being sold. We didn't sell the  
4 RIMS system.

5 Q You talked about used at customers' facilities; right?

6 A Used at customer facilities. It wasn't sold. It wasn't  
7 something we sold.

8 Q Well, you got a trademark on the RIMS trademark; you  
9 understand that, don't you?

10 A Yes.

11 Q And that's something that you have to get only if you are  
12 using it in commerce; right?

13 MR. ROBERTSON: Objection, lacks foundation.

14 THE COURT: Do you know about getting a trademark?

15 THE WITNESS: I know what a trademark is.

16 Q Isn't it true --

17 THE COURT: He's twice now said they were using it,  
18 that people were using it, it wasn't being sold.

19 Q Mr. Momyer, wasn't the RIMS system, though, part of the  
20 sales pitch to Fisher's customers at the time that if you buy  
21 products from Fisher, we'll provide to you the RIMS system as  
22 part of our services?

23 A It was definitely a tool that was used to help Fisher  
24 perform its duties better at a customer's location and,  
25 therefore, convince the customer that they should continue to

1 do business with them.

2 Q Would you agree that the RIMS system was on sale more than  
3 one year before the patents involved in this suit were filed?

4 MR. ROBERTSON: Objection. He just testified several  
5 times it wasn't on sale.

6 THE COURT: How many more times does he have to say  
7 it wasn't on sale, it was used. Now, whether you like that or  
8 not is a different issue, but it was used. I think he was  
9 saying it was used by people who were -- what do you call them?

10 THE WITNESS: Customer service representatives.

11 THE COURT: And they were employed by whom?

12 THE WITNESS: Fisher.

13 THE COURT: And sometimes they were stationed at  
14 customers' locations, and sometimes they were stationed at  
15 Fisher's location; is that right?

16 THE WITNESS: That's correct.

17 THE COURT: He said it was used.

18 Q The RIMS system was marketed to customers through a  
19 brochure; correct?

20 MR. ROBERTSON: Your Honor, I'm going to object  
21 because the RIMS system is vague and ambiguous. The witness  
22 has testified repeatedly that there were several iterations or  
23 versions of the RIMS system. It's important that we know which  
24 one we're talking about at which point in time.

25 MR. McDONALD: I'm just trying to lay some

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1 foundation.

2 THE COURT: Let's put a time in it. In 1991, in  
3 1992, whatever.

4 Q In the 1992 time frame, Mr. Momyer, isn't it true that  
5 that RIMS brochure was being used and distributed to potential  
6 customers to advertise the RIMS system?

7 A Which brochure are you talking about?

8 Q Well, we can put that one up. I think it's Defendant's  
9 Exhibit 61. Actually put up 62, because that's the trademark  
10 application that has it in. Actually, let's go to Exhibit 61  
11 after all.

12 So there's the first page of it, Mr. Momyer. I think that  
13 might be in the book as well, but do you recognize that  
14 brochure?

15 A Yeah, I do recognize that.

16 Q And that was distributed in 1992; right?

17 A I don't know. I really don't know when it was  
18 distributed.

19 Q You know that Fisher used that as their example of using  
20 the trademark since 1992 when they filed the trademark  
21 application --

22 MR. ROBERTSON: Objection. There's been no  
23 foundation on that.

24 THE COURT: I'm sorry. I didn't hear the last of the  
25 question because you objected. Would you ask the question

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1 again, please. Don't answer, Mr. Momyer, because there may be  
2 an objection, but I didn't hear.

3 Q Mr. Momyer, you know that this brochure was used by Fisher  
4 as proof of use of the Fisher trademark dating back to 1992;  
5 right?

6 MR. ROBERTSON: Objection, lacks foundation.

7 THE COURT: Just ask him if he knows. Do you know  
8 that one way or the other? Was Fisher using this as proof that  
9 it used the system?

10 THE WITNESS: I don't recall. It may have been  
11 brought up earlier. I just don't recall. I don't know what  
12 that means, was being used as proof --

13 THE COURT: Proof of use? You don't know what proof  
14 of use means?

15 THE WITNESS: No.

16 THE COURT: That's a term, Mr. McDonald, that has to  
17 do with the trademark that, in fact, he says you didn't know  
18 what that was all about. So let's go on to something he does  
19 know something about.

20 Q Mr. Momyer, you and the other inventors did disclose some  
21 brochures regarding some Fisher products as prior art in  
22 connection with the patents-in-suit; right?

23 A Yes.

24 Q And if we turn, for example, to the '683 patent, go back  
25 to that, Exhibit 1, and if we -- actually, go to the second

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1 page of the '683 patent.

2 A What page?

3 Q The second page, page two.

4 THE COURT: It has other publications on the top of  
5 it. Do you have that?

6 THE WITNESS: I see it. Thank you.

7 Q Mr. Momyer, do you see I've got a little green mark on the  
8 screen next to a product called Fisher StockPro inventory  
9 management system?

10 A Yes.

11 Q Was that a Fisher product?

12 A Yes.

13 Q Did you disclose the brochure about -- or some information  
14 about that product to the Patent Office in connection with the  
15 patents involved in this suit?

16 A Does that mean that it should have been disclosed if we  
17 state it there? I'm assuming we did. The patent filing was --  
18 I didn't do the patent filing.

19 Q Do you remember gathering --

20 THE COURT: His question is, he didn't do the patent  
21 filing. When he lists other publication, does that mean  
22 disclosed. That's what he was asking you, is that what you  
23 meant by disclosed; is that right?

24 THE WITNESS: Yes.

25 THE COURT: Is that what you meant in your question

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1 by disclosed?

2 MR. McDONALD: Let me clarify it.

3 Q Mr. Momyer, did you through a process of gathering  
4 information --

5 A Yes, I did.

6 Q Let me finish the question because that's a pretty rough  
7 question right there. -- information in connection with your  
8 patent application in this case?

9 A Yes.

10 Q And did that include some prior Fisher product materials?

11 A Yes.

12 Q So StockPro was one of them; right?

13 A StockPro was one.

14 Q And go to the second column. There's one called  
15 PurchasePro; do you see that?

16 A Yes.

17 Q Did you gather up literature about PurchasePro for  
18 disclosure to the Patent Office?

19 A One of the inventors may have. I don't recall myself  
20 pulling that together.

21 THE COURT: Excuse me a minute. When he asks him a  
22 question about a particular part, it would be better if you  
23 would zero in on the part of the text, if you can blow it up,  
24 because it's hard to read those things.

25 THE WITNESS: That's what I'm looking at right now.

1 Q And there's some other Fisher products, for example the  
2 next one listed, Fisher Lightning product; is that right?

3 A It's not up on the screen, but -- right now.

4 Q We'll try to get it up on the screen for you here.

5 A Yes, I see that.

6 Q These were some prior Fisher products that would help with  
7 the electronic order entry and purchasing and things like that;  
8 correct?

9 A That's correct.

10 Q But you disclosed no literature at all to the Patent  
11 Office, no publication at all that related to the RIMS system,  
12 did you?

13 MR. ROBERTSON: Objection, Your Honor. No allegation  
14 in this case whatsoever that the inventors withheld anything  
15 material from the Patent Office. There's nothing within the  
16 Court's final pretrial order that was agreed upon that would  
17 have any relevancy to whether or not they disclosed the RIMS  
18 publication. As Your Honor observed, they incorporated by  
19 reference the RIMS patent.

20 MR. McDONALD: This is testifying by Mr. Robertson at  
21 this point.

22 THE COURT: It's also something I think I've ruled on  
23 and I think the witness testified about it earlier, if I  
24 remember. There's a statement about the RIMS patent in column  
25 one right up at the top, and he said, yes, we told them that.



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1 That's what -- whether you like that answer or not, that's the  
2 one he gave before. Has it changed?

3 MR. McDONALD: Your Honor, I'm just clarifying that  
4 there were no publications regarding the RIMS system that were  
5 disclosed to the patent. I don't think that's even disputed  
6 yet at all, but --

7 THE COURT: That's not an issue in the case.

8 MR. McDONALD: Yes, it is.

9 THE COURT: What is it?

10 MR. McDONALD: That the RIMS brochure, the fact that  
11 the RIMS system was on sale. That is a discrete piece of prior  
12 art --

13 THE COURT: That doesn't mean it was disclosed. You  
14 don't content that it wasn't disclosed. You contend that it  
15 was on sale. They are two different proof items.

16 MR. McDONALD: Well, we're going to prove both, it  
17 was on sale --

18 THE COURT: Is that an issue in the case? I don't  
19 remember --

20 MR. McDONALD: The fact that the RIMS system was on  
21 sale as prior art --

22 THE COURT: No, no, no. I know that is an issue.  
23 The failure to disclosure is not an issue.

24 MR. McDONALD: They have disputed, and we dispute  
25 that the patent --

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1 THE COURT: That's not what I -- I just want you to  
2 listen. I think you need listen. Is that, is the failure to  
3 disclose an issue; yes or no? Is it an issue that's in the  
4 case? Did you raise it as a defense?

5 MR. McDONALD: It's not -- that answer -- it's hard  
6 to answer that question because it is disputed whether or not  
7 the Patent Office did consider it.

8 THE COURT: That's not the issue, what they  
9 considered. It's what was disclosed. Listen. Are you  
10 contending that there was a failure to disclose on the Patent  
11 Office? I don't remember it.

12 MR. McDONALD: It's not a separate defense, Your  
13 Honor, but it's part of our explanation of why the Patent  
14 Office did what they did here, that it wasn't disclosed, and,  
15 therefore, the Patent Office --

16 THE COURT: Then the question is simply this: Was  
17 one of those brochures listed in the other publication; right?

18 MR. McDONALD: Yes.

19 THE COURT: Then ask that. Quit using the words that  
20 animate a defense that you haven't actually pleaded.

21 Q Mr. Momyer, would you agree that at least here in the '683  
22 patent -- if we can back up to that whole list of publications  
23 and blow that up as best we can -- that there's no RIMS, no  
24 reference to any RIMS publications or literature in that list?

25 MR. ROBERTSON: I understand the Court's ruling. I

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1 want to preserve the record, so I object on relevancy.

2 A There is no mention of RIMS in that listing of other  
3 publications.

4 Q Just to be comprehensive, can we go back to page one,  
5 please. Do you see there's a list of other publications in the  
6 right column there? That's actually the start of that list;  
7 right, Mr. Momyer? Then it says continued on next page?

8 A Yes.

9 Q And the RIMS, there's no RIMS literature listed on the  
10 first page of the patent either?

11 MR. ROBERTSON: Same objection, Your Honor.

12 A There's no list of RIMS on either of those listings under  
13 other publications.

14 Q Now, in the patent, you do mention the technical viewer,  
15 TV/2 system in the description of the patent; correct?

16 A I think we always mentioned the RIMS systems in the --

17 Q Just answer my question, please, Mr. Momyer.

18 A Yes.

19 Q The TV/2 system is mentioned in the specification of the  
20 patent, but it was -- the literature about that product was  
21 also listed here under other publications; correct?

22 A Yeah. It was listed there, yes.

23 Q We see here there's two documents; right? The IBM  
24 technical viewer general information manual, 1991; right?

25 A Yes.

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1 Q The second one, IBM Technical Viewer/2 product information  
2 and brochure, IBM Corporation undated; right?

3 A Yes.

4 Q And so even though the TV/2 system is mentioned in the  
5 body of the patent, you also disclosed and listed these other  
6 publications involving TV/2; correct?

7 A Yes.

8 Q But you didn't do that for the RIMS system; did you?

9 MR. ROBERTSON: Objection, asked and answered three  
10 times.

11 THE COURT: Yes. I agree. Sustained. You don't  
12 have to answer.

13 Q Now, at the time -- if we can go back to the cover page  
14 here, when this application for the patents-in-suit was filed  
15 in August of 1994 --

16 THE COURT: Excuse me, Mr. McDonald. This is not the  
17 application. You said when this application. This isn't the  
18 application. It's the final issued patent.

19 If you want to ask him about the application, then  
20 get the application in front of him or -- you all have to  
21 remember something. You all deal with these terms all the  
22 time. The jury doesn't, and it's easy for the jury to be  
23 confused, and I'd like you to make sure your question is  
24 precise. If you want to ask him about the application, do  
25 that. If you want to ask him about the patent, that's fine,

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1 too. Just be precise.

2 MR. McDONALD: That's fair enough.

3 Q Mr. Johnson, I think just to keep our dates straight here,  
4 I think you talked about the RIMS application --

5 MR. ROBERTSON: I think you misspoke. You called him  
6 Mr. Johnson.

7 MR. McDONALD: At least I didn't call him Dr. Weaver.

8 Q Mr. Momyer, you recall that the RIMS application for the  
9 patent was filed in April of '93 'right?

10 A Yes.

11 Q I think we talked earlier, it was actually issued in '98;  
12 correct?

13 A Yes.

14 Q So the patent application that gave rise to the '683  
15 patent as shown here, that was filed in August of '94; correct?

16 A That's correct.

17 Q So at that point, the RIMS patent hadn't issued yet;  
18 right?

19 A Yes.

20 Q So when you filed it, you weren't trying to tell the  
21 Patent Office in August of '94 that the RIMS patent had  
22 actually issued and would be considered prior art as an issued  
23 patent, were you?

24 MR. ROBERTSON: Objection, that lacks foundation and  
25 calls for legal expertise that I'm not sure this witness has,

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1 the significance of those dates and whether it was prior art.

2 THE COURT: I agree. I sustain the objection.

3 Q Let's go to the file history then. I think that's PX-4,  
4 Mr. Momyer.

5 MR. McDONALD: This is already in evidence, Your  
6 Honor, as the file history for the '683 patent.

7 Q Can we turn to the page that would be page number ePlus  
8 0703564.

9 A Are you going to bring that up on the screen?

10 Q I think that should be about page 26 or so of the  
11 document.

12 THE COURT: Last three digits are what?

13 MR. McDONALD: 564.

14 THE COURT: That's PX-4?

15 MR. McDONALD: Correct.

16 THE COURT: In the book you handed up?

17 MR. McDONALD: Yes.

18 THE COURT: My PX -- I see. There's two different  
19 numbering systems down there. It's the lower numbering system  
20 he's talking about. One of them is EP, and the other is ePlus,  
21 and the last three digits of 04 start with 539, and he's  
22 looking for 564; is that right?

23 MR. McDONALD: Yes. Do you have that page 564 now?

24 THE COURT: 564, Mr. Momyer, is on the reverse side  
25 of 03, of 563.

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1 THE WITNESS: I think it's up on the screen.

2 THE COURT: Good for you if you can read it.

3 MR. McDONALD: If we can blow up that circular symbol  
4 in the upper left corner, Bill.

5 Q Do you see that's got a date stamp on it from the Patent  
6 and Trademark Office of August 10th, '94, Mr. Momyer?

7 A Yes.

8 Q Back off again here. So, do you recognize this as at  
9 least the page of your patent application, the background of  
10 the invention section as filed with the Patent Office in August  
11 of '94?

12 A I've never seen this document before.

13 Q Isn't this the one you actually reviewed when you signed  
14 your declaration?

15 A I don't recall.

16 Q What did you review --

17 A I may. It's been a long time, very long time. I can't  
18 recall the document.

19 Q Well, you can thumb through it if you'd like, review it,  
20 but I will direct your attention to your declaration. That's  
21 basically the next document right after the end of this one  
22 called declaration and power of attorney beginning on page  
23 ending in 3646. That's about page 108 maybe. You can blow up  
24 the text part of that. Do you see up at the top it says  
25 declaration and power of attorney, Mr. Momyer? Do you see

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1 that?

2 MR. ROBERTSON: What exhibit is this, Mr. McDonald?

3 MR. McDONALD: PX-4.

4 THE COURT: PX-4, page 3646.

5 A I see.

6 Q Then if you scroll down a little bit, below that part, you  
7 see there's a box checked that says, specification of which is  
8 attached here to?

9 A Yes.

10 Q And if we go three pages further up, we see your name is  
11 on this declaration; right?

12 A Yes, I see it.

13 Q And on this document, you didn't sign it, but if we go up  
14 a few more pages, another 12 pages to the page 3661, the last  
15 four digits up at the top, you see that you did eventually sign  
16 that declaration; correct?

17 THE COURT: Isn't it agreed that this is the  
18 application for the patent?

19 MR. McDONALD: I thought it was, but he was saying he  
20 wasn't sure about that, so I wanted --

21 THE COURT: He said he hadn't read it in a long time.  
22 It's been since whenever it was filed, and he said he just  
23 didn't remember it. What are you doing?

24 MR. McDONALD: Well, trying to refresh his  
25 recollection.



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1 Q Is this is the document you looked at and signed off on,  
2 Mr. Momyer, with respect to your oath; correct?

3 A Yes.

4 Q So if we can go back to that page that ends with 3564,  
5 page 26 of the document, if we can blow up that second  
6 paragraph there. Just the second paragraph, please. That's  
7 enough of it right there.

8 So in the typewritten version of this document filed in  
9 August of '94, do you see there's a reference there to the  
10 Fisher RIMS system?

11 A Yes.

12 Q And here it's described as being in a co-pending patent  
13 application; correct?

14 A Yes.

15 Q So that clarifies that when the patents-in-suit were  
16 originally filed in August of '94, you weren't portraying the  
17 Fisher RIMS patent application as an actual issued patent;  
18 right?

19 A Is that what that means?

20 Q Do you understand the difference between a pending  
21 application and an issued patent?

22 A Yes.

23 Q So you're representing it's a pending application but not  
24 an issued patent; right?

25 MR. ROBERTSON: I'll stipulate. It's already

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1 answered --

2 THE COURT: Stipulated.

3 MR. ROBERTSON: -- the '989 did not issue until 1998.

4 MR. McDONALD: So he's stipulated to that?

5 THE COURT: He did. That would have saved us  
6 15 minutes if we had done that before like I asked you to do,  
7 all that, both of you.

8 Q Now, would you agree that the RIMS patent application  
9 describes the concept of cross-referencing or converting  
10 between two products from different sources in some detail?

11 A What was the question again?

12 Q Would you agree with me that the RIMS patent talks about  
13 cross-referencing or converting between products from two  
14 different sources in some detail?

15 MR. ROBERTSON: I'll object. I think the question is  
16 vague and ambiguous, and the Court has already made  
17 constructions with respect to some of these terms. I'm not  
18 sure how Mr. McDonald is using it in his question.

19 THE COURT: Your first question was whether the  
20 application did something, and now you moved to the patent. Is  
21 your question whether the RIMS patent, which is what, PX-10?

22 MR. McDONALD: PX-10, that's right.

23 THE COURT: Contains a term called cross-referencing?

24 MR. McDONALD: The question was actually whether it  
25 has, in fact, a fairly detailed discussion of cross-referencing

1 in that patent as it was filed, the RIMS patent.

2 THE COURT: I don't remember that being asked either.

3 So is that what you want to ask him?

4 MR. McDONALD: Yes.

5 THE COURT: Do you remember whether the patent for  
6 RIMS, which is PX-10, has a description of cross-referencing  
7 that is somewhat detailed?

8 THE WITNESS: Yes.

9 MR. ROBERTSON: Can I object to Your Honor's question  
10 because cross-referencing is a claim term. I just want to make  
11 sure we're using -- are we using it in --

12 THE COURT: He's using it as used in the RIMS patent,  
13 not as I have construed it in these patents.

14 Q Mr. Momyer, if you can turn to Exhibit 10 and go to the  
15 bottom of column 31 of the '989 patent. Do you have that  
16 before you now? Do you see at the bottom of column 31 it talks  
17 about cross-referencing and begins a whole section, really,  
18 titled cross-referencing; correct?

19 A Which column is that in?

20 Q Bottom of column 31.

21 A Okay.

22 Q That discussion of cross-referencing continues for all of  
23 columns 32 -- all of column 32; correct?

24 A Yes.

25 Q And also continues in column 33 and column 34 if you go to

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1 the next page; correct?

2 A Yes.

3 Q And in that discussion, it does talk specifically about  
4 cross-referencing a similar product from two different vendors;  
5 correct?

6 THE COURT: Do you want him to read all three of  
7 those columns and then ask him the question? It's there or  
8 it's not.

9 MR. McDONALD: You would agree --

10 THE COURT: Point him to the page and the line. You  
11 are asking somebody to look back at something that's dated a  
12 long time ago, and you guys are familiar with it, but he  
13 doesn't study this stuff all the time.

14 Q Can we zero in on the bottom of column 33 beginning at  
15 about line 52, Mr. Momyer. Column 33, about line 52. Let's go  
16 ahead and highlight it or expand it, Bill, all the way to the  
17 end of that column. Do you see here this is a section talking  
18 about a product having a vendor number such as 1,000 --

19 A It's lost.

20 THE COURT: It's not there.

21 Q Do you see that around line 54 of column 33, Mr. Momyer,  
22 where there's a reference -- this is in the RIMS patent now;  
23 right, correct? Just so you have your bearings, Mr. Momyer,  
24 we're in the RIMS patent; right?

25 A Yes.

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1 Q So, if you see, there's a reference to vendor number such  
2 as 1000 space 250, or a competitor's number such as B2650250;  
3 right?

4 A Yes, I see that.

5 Q Then it goes on to say, the hose computer will search  
6 various files in the host database as during sourcing described  
7 above and recognize each as a number corresponding to  
8 distributor catalog number 02 540K. Do you see that?

9 A Yes.

10 Q And then you see there's a little code there at about line  
11 61 that has two numbers that start off with the letters VN?  
12 One has the number VN00002047; correct?

13 A Yes.

14 Q And the other one is VN with a long string of zeros  
15 followed by the number one; right?

16 A Correct.

17 Q Those are two different vendor numbers that represent  
18 Corning and the distributor in this example; correct?

19 A One thing you have to be aware of, this is all within  
20 Fisher product files. All it's really doing is  
21 cross-referencing the fact of a Fisher number. That is the  
22 intent of that cross-reference.

23 Q Whatever the intent is, I understand its cross-reference  
24 Fisher. That Fisher would be the distributor there, right,  
25 with the capital D there?

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1 A Yes.

2 Q But there's another vendor number for Corning; right?

3 A It's a vendor number internal to the Fisher environment.

4 Q But it represents a different vendor; right?

5 THE COURT: Which "it"?

6 MR. McDONALD: The vendor number representing  
7 Corning.

8 A Yes. It does represent -- VN00002047 would be another  
9 vendor, but it's a vendor internal to Fisher, Fisher vendor  
10 number.

11 Q So the RIMS system, as it existed in April of '93, had  
12 this conversion system there?

13 A This was the host-based.

14 Q I'm just asking for the timing on it right now,  
15 Mr. Momyer. Would you agree that the RIMS system, as of April  
16 of '93, had this conversion system in it?

17 MR. ROBERTSON: Conversion system as described by the  
18 RIMS patent? I think it's vague and ambiguous.

19 MR. McDONALD: As we've been going through it here.

20 A Yes.

21 Q I'd like to turn now to the inventory, issue of checking  
22 inventory. Would you agree with me that the RIMS system, at  
23 least as of April of '93, was capable of checking inventory?

24 MR. ROBERTSON: Objection, vague and ambiguous as to  
25 whose inventory. That is an important issue here.

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1 MR. McDONALD: No, it's not. It's not in the claims.

2 THE COURT: What?

3 MR. McDONALD: The issue of whose inventory you are  
4 checking is not in any of the claims in this case. It is not  
5 an important issue.

6 MR. ROBERTSON: In the patent, you are checking  
7 multiple catalog inventory of suppliers. That's what's going  
8 on here. The testimony has been in the RIMS systems, you are  
9 checking Fisher inventory.

10 MR. McDONALD: We have no testimony from Mr. Weaver  
11 or anybody else that said that checking inventory had to be  
12 specific to any particular type of source.

13 THE COURT: We'll deal with that --

14 MR. McDONALD: -- limited to checking inventory.

15 THE COURT: We'll deal with that later. Overruled.

16 Q Would you agree, Mr. Momyer, that the RIMS system, at  
17 least as of April of '93, was a system that did check  
18 inventory?

19 A It checked local inventory it was managing and Fisher  
20 inventory at its distribution centers.

21 Q And that local inventory could include stockroom inventory  
22 for the customer; correct?

23 A It could include both customer and Fisher-owned inventory,  
24 yes.

25 Q And the RIMS system included a parts master, like an item

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1 master; right?

2 A Yes.

3 Q That was the RIMS as it existed in April of 1993?

4 A It would have had that.

5 Q That's a system where the customer could select the  
6 products that might come from various sources such as Fisher  
7 and specifically select the products that they were going to  
8 keep in inventory and keep track of on that parts master;  
9 correct?

10 A They could really only order Fisher parts. Is that what  
11 you are asking? For. They did have the ability for  
12 customer-owned inventory, but I think we established that the  
13 customer-owned inventory, depending upon how it's replenished,  
14 it could issue a req to be input into the customer's system to  
15 place the order.

16 Q I'm not sure that was actually my question, Mr. Momyer.  
17 Let me try again. Would you agree that the parts master in the  
18 RIMS system, as it existed in April of '93, included products  
19 that the customer would select to put on that list because  
20 that's what they wanted to keep track of in inventory?

21 A Customer would select? Meaning what they wanted to put in  
22 inventory?

23 Q They would select the parts that went onto the parts  
24 master; right?

25 A Yes, they would select the part. As far as the -- you



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1 mean -- they would go in, and we would ask them what products  
2 do you want stored in your stockroom, and they would say these  
3 parts we want to store in the stockroom, and then we would  
4 enter those into the RIMS systems. Almost exclusively they  
5 were Fisher parts.

6 Q That parts master would keep track of what was called  
7 product type in the RIMS system; correct?

8 A Yes, that's correct.

9 Q And that product type could include products that were  
10 third-party items which the CSR, customer service  
11 representative, or the customer could order; right?

12 A No.

13 Q Can you turn to column six of the '989 patent, please.

14 THE COURT: What section is the '989 patent.

15 MR. McDONALD: PX-10.

16 Q That's the RIMS patent, Mr. Momyer, so I think you might  
17 already have that in front of you there.

18 THE COURT: Put it up.

19 A I've got it.

20 Q Column six, blow up that table at the top of column six.  
21 Do you see, Mr. Momyer, this is a continuation of a table  
22 listing the product types for the RIMS systems?

23 A Yes.

24 Q And you see there's a type 05?

25 A Yes.

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1 Q That's called, or its description is third-party item  
2 which CSR or customer orders; right? Do you see that?

3 A What that means is --

4 Q First, do you see it?

5 A I see it, yes.

6 Q You agree there was a product type for that?

7 A Yes.

8 Q That's in addition to --

9 THE COURT: What does it means? I want to hear what  
10 he's saying. What does it mean?

11 THE WITNESS: The product type 05 would be a product  
12 that would be -- we consider customer-owned inventory, and it  
13 would be a product that -- we were just keeping it in our  
14 system for recordkeeping purposes, keeping track of the count  
15 of inventory, how much was there, when it was issued, how much  
16 was issued out.

17 But when it came time for the buyer to replenish  
18 that, all the RIMS system would do would send a note saying  
19 this amount of items needs to be reordered, and then we would  
20 basically hand that over to the customer. The customer would  
21 enter that into their purchasing system to buy.

22 CSR, in some cases, the CSR would call up on behalf  
23 of the customer and place that order. It wouldn't be placed in  
24 RIMS, though. I think we pointed out earlier that that  
25 particular product was very clearly only there for

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1 recordkeeping purposes. I think there were several references  
2 in my prior testimony.

3 Q Okay. So that is product type 05, and then product type  
4 06 is a customer-owned item located in a customer warehouse at  
5 or near the customer's site; correct?

6 A Yes.

7 Q So that is also something that's different from a product  
8 that was owned by the distributor such as Fisher; correct?

9 A No. Yes, it is, but it's -- 06, most of our product type  
10 06s were for customer-owned inventory. Most of those were  
11 products that Fisher had and the customer bought from Fisher.  
12 When the inventory replenishing came to replenish that order,  
13 the replenishment order went straight to Fisher.

14 Q But there are situations separate from that where a  
15 customer would actually replenish by generating an internal  
16 purchase order; correct?

17 A Those 06s, they are really two different replenishment  
18 types for those 06s, multiple replenishment types. The primary  
19 ones would be it's a Fisher product or it's an 05, in which  
20 case it would do same thing. It would create a requisition  
21 that would go through, create a paper, req, go buy this amount  
22 and turn over to the customer, the customer would buy it.

23 Q Isn't it true that for that product type 06, the RIMS  
24 patent itself describes the document it created as a customer  
25 internal purchase order?

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1 A Yes. But also, there's numerous places throughout that it  
2 says product type requires that the RIMS system isn't  
3 responsible for placing the purchase order. Numerous places in  
4 the patent.

5 Q But you do agree -- I think you said the word yes before  
6 you gave that explanation. Wouldn't you agree that the patent,  
7 the RIMS patent application that's incorporated by reference in  
8 the patents-in-suit calls that document an internal customer  
9 purchase order for that product type 06?

10 THE COURT: Wait a minute. You asked him about the  
11 patent application, and the patent application, is that  
12 incorporated in the patent?

13 MR. McDONALD: Yes. That's what that page shows on  
14 that.

15 Q And you said yes in answer to my question?

16 A There is wording in the patent, I recall, that does call  
17 it internal customer.

18 Q And the RIMS system, as it existed in April of '93 when  
19 that application for RIMS was filed, that can generate a  
20 purchase order for the Fisher system and also that internal  
21 customer purchase order for a type 06 product; right?

22 A I understand what it said, but as I said, there's numerous  
23 places in that patent that says that the RIMS system does not  
24 place the purchase order.

25 Q Let's talk about the places it does say that. Let's turn

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1 to figure 5A of the '989 patent, Mr. Momyer. Can we blow up  
2 the boxes going from about the diamond 332 down to including  
3 336, both left and right side. This is a flow chart,  
4 Mr. Momyer, from the RIMS patent; correct?

5 A Yes.

6 Q This is a flow chart that the patent says describes  
7 programs employed by an embodiment of the system of the  
8 invention to accept a source requisition; right?

9 A Yes.

10 Q So in this RIMS system, we see that diamond there where  
11 the question is, is it a product type 01, 03, or 04; right?

12 MR. ROBERTSON: Your Honor, I'm just going to object.  
13 It's cumulative. We went through this figure at length within  
14 Mr. Momyer's direct testimony. Cross-examination by Mr.  
15 McDonald --

16 THE COURT: Really have been through it a lot, Mr.  
17 McDonald. Even I remember it.

18 MR. McDONALD: Well, I'll just try to wrap it up  
19 maybe, Your Honor.

20 THE COURT: Let's just move on. Go on and ask  
21 something else. The record is clear on that.

22 Q Now, is it true that the reason why there would be an  
23 internal customer order generated is that for some companies,  
24 there's actually an obligation for a requisitioner who is in  
25 department A to pay stockroom management who is in another part

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1 of the company?

2 MR. ROBERTSON: Objection, lacks foundation.

3 THE COURT: What?

4 MR. ROBERTSON: I think it lacks foundation.

5 THE COURT: He can ask him if he knows it.

6 Overruled.

7 A That was one of the things that it did keep track of, was  
8 the ability to -- for an internal transfer of funds within that  
9 customer from requisition department to the owning department.

10 THE COURT: Within the same customer?

11 THE WITNESS: Within the same customer.

12 Q Would you agree that -- we'll go away from that topic now  
13 and move on to some other things. Would you agree that the  
14 parts master in the RIMS system is not organized like a catalog  
15 from the vendor?

16 A Yes. I don't think it is.

17 Q How, if at all, is a parts master organized?

18 A This particular parts master in RIMS?

19 Q Yes.

20 A The key to it is the Fisher part number, and then it has  
21 data specific to that. Primarily it's stock-keeping  
22 information relating to the product.

23 Q Is a parts master, is that basically organized in terms of  
24 just the order the products get ordered into the parts master  
25 list, that's how it's organized?

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1 A No. It's -- they all, the products get entered. The way  
2 the system works is there's a key, which is the product number,  
3 and that key -- if you enter the product number, it allows you  
4 to specifically pull up all the detailed information about the  
5 product. So it's a keyed table.

6 Q Now, the RIMS system include both a local computer and a  
7 host computer; right?

8 A Yes.

9 MR. ROBERTSON: Object as to the RIMS system because  
10 I think there's been testimony there's been dozens of  
11 iterations, so I think it's vague and ambiguous what we're  
12 taking about.

13 MR. McDONALD: I can rephrase that.

14 Q The RIMS system, as it existed in April of '93, had a  
15 local computer and a host computer; right?

16 A It had components that ran locally and a host, yes.

17 Q At the host, was there a database there with a list of the  
18 Fisher products as part of the RIMS system that existed in  
19 April of '93?

20 A I don't know if I'd consider that part of the RIMS system,  
21 but there was a product file that was on the Fisher host which  
22 had all the products that Fisher would buy.

23 Q Okay. Are you saying you don't agree that the Fisher  
24 system included both the host system --

25 A I have trouble in my mind separating where the RIMS system

1 ends and the Fisher system, other Fisher systems pick up. I  
2 will agree that there's a product file that's on the host that  
3 contains product information.

4 Q All right. Well, let's get at least on the same page in  
5 terms of whether the RIMS system holds the host computer as  
6 well. Could you turn to the bottom of column two of  
7 Plaintiff's Exhibit 10 still, the RIMS patent that was filed in  
8 April of '93.

9 Do you see there under the first sentence under the  
10 heading detailed description of the invention, it says, quote,  
11 the requisition and inventory management system of the present  
12 invention, which is shown in figure one, employs at least two  
13 computers, a host computer 10 located at a distributor site and  
14 a local computer 40 used by a customer service representative,  
15 CSR --

16 A I think --

17 Q -- at or near the customer site and the site of JIT  
18 inventory?

19 A I think I already said that.

20 Q So you would agree that the system in the RIMS application  
21 described as the RIMS systems does include both a local and the  
22 host computer?

23 A Yes.

24 Q Okay. So at that host computer, then that Fisher  
25 database, would you consider that to be a Fisher catalog?



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1 MR. ROBERTSON: Your Honor, I'm going to object, Your  
2 Honor, because obviously the term catalog is ripe with meaning  
3 as the Court has construed it. And before Mr. Momyer  
4 testified, the objection was sustained that he couldn't give an  
5 opinion with respect to whether it was a catalog or not a  
6 catalog given the Court's construction which Mr. Momyer is  
7 unaware.

8 MR. McDONALD: I'm asking for his understanding, Your  
9 Honor. We have a lot of testimony in this case about the word  
10 catalog apart from the claims, but I'd like to start with his  
11 understanding.

12 MR. ROBERTSON: His understanding is not relevant  
13 unless it's going to be applied to the Court's claim  
14 construction, and he is not aware of that.

15 MR. McDONALD: That's where the follow-up questions  
16 will come into play.

17 THE COURT: Well, you don't get any follow-up  
18 questions to an irrelevant question. Why is his understanding  
19 of catalog in this case relevant given that the Court has  
20 construed the term?

21 MR. McDONALD: Trying to get an understanding of what  
22 -- he got his invention. He's describing in their patents as  
23 including these catalogs. What did they have in mind as the  
24 inventors as to what is and what is not a catalog would  
25 certainly be important to one of ordinary skill, even in the

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1 application.

2 MR. ROBERTSON: The case law is clear that even an  
3 inventor can't construe the claims once the Court's construed  
4 the claims. He can't testify in variance to what the Court's  
5 construction is.

6 THE COURT: I think that's quite clear. Sustained.

7 Q Would you agree, Mr. Momyer, that for purposes of the  
8 patents in the present case, you envisioned a catalog database  
9 that would be searched by a system like a TV/2 system; correct?

10 A Yes.

11 MR. ROBERTSON: Same objection, Your Honor. First of  
12 all, it's still infected with the word catalog, and secondly,  
13 the patents in this case, and we've been talking the '989, the  
14 '683, this other patent. I'm not really sure what patent we're  
15 talking about at this point. Vague and ambiguous, and it still  
16 begs the question as to what a catalog is which the Court has  
17 construed.

18 THE COURT: Objection to the form of the question is  
19 sustained.

20 Q Now, would you agree that -- you were involved when Fisher  
21 started working with IBM to actually create the system that led  
22 to the three patents that are involved with this lawsuit?

23 A I'm sorry?

24 Q I'm changing gears here a little bit.

25 A Okay.

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1 Q Threw you off a bit, but I'd just like to talk about  
2 Fisher working with IBM now to develop a system that led to the  
3 patents that are asserted in this case, okay, so can we shift  
4 gears on that topic?

5 A Yes.

6 Q You were involved with working with IBM; right?

7 A Yes, although not -- I wasn't the primary person working  
8 with IBM, but, yes, I was involved.

9 Q And did IBM's system have a search capability that could  
10 do keyword searches before you started working with them?

11 A Technical Viewer/2 could do keyword searches against a  
12 document, yes.

13 Q And that TV/2 system, you saw some literature about that  
14 product from IBM; correct?

15 A I've seen that literature really after the fact. I have  
16 seen that literature, but when I saw the literature, that's why  
17 I recall it was when we first started talking about these  
18 cases, in this case. Not this particular cases but prior  
19 cases, but I have seen that document, yes, talking about TV/2.

20 Q Okay, but you do understand that the TV/2 system before  
21 Fisher ever showed up at IBM was capable of searching a number  
22 of technical publications that could be held on a single CD?

23 A That wasn't my understanding. My understanding, you could  
24 search a single document.

25 Q Could we turn to Defendant's Exhibit 107. Let's start

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1 with the first page first. Do you recognize this Exhibit 107,  
2 Mr. Momyer, as a copy of the brochure for the Technical  
3 Viewer/2 system from IBM?

4 A I've seen that. I don't recall when I saw it.

5 Q Well, if you go to the last page of that document, please.  
6 And there's some bullet points on the right side of the page.  
7 Let's do the right side. Actually, the last bullet point on  
8 that right side.

9 MR. ROBERTSON: I'm going to object. This lacks  
10 foundation. The witness says he doesn't remember if it was  
11 contemporaneous with his work with IBM, that he's seen it as  
12 part of the enforcement actions that have been brought with  
13 respect to this patent. There's been no foundation laid he's  
14 familiar with this document or its contents other than that.

15 MR. McDONALD: I'd like to establish whether he  
16 recalls this specific bullet point as something that was  
17 communicated to him.

18 THE COURT: Well, have you established when this  
19 document was --

20 MR. McDONALD: I think Ms. Eng did earlier.

21 MR. ROBERTSON: This document is undated, Your Honor.

22 THE COURT: I think she said it was undated, and she  
23 didn't know when it was prepared.

24 MR. McDONALD: She knows she had used it in 1992.

25 MR. ROBERTSON: That testimony was completely

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1 uncorroborated other than her naked testimony which, as Your  
2 Honor knows, is important in this case.

3 THE COURT: I'll see -- what do you want -- what are  
4 you doing?

5 MR. McDONALD: I'm just confirming, seeing if I can  
6 refresh his recollection --

7 THE COURT: Ask him, does looking at this refresh  
8 your recollection about something. So don't answer any  
9 question yet. Refer him to what you want to look at.

10 Q Do you see that last bullet point there up on the screen,  
11 Mr. Momyer, in this TV/2 brochure that says, large capacity  
12 means all technical publications can often be held on a single  
13 CD-ROM?

14 A I see that, yes.

15 Q Does seeing that refresh your recollection when Fisher  
16 started working with IBM that the TV/2 system had the  
17 capability of searching multiple technical publications on a  
18 single CD-ROM?

19 A No.

20 Q You don't remember one way or the other?

21 A Honestly, when I saw this publication, the earliest I can  
22 recall seeing it was when in prior cases it was presented. It  
23 doesn't mean -- I don't recall.

24 THE COURT: So it doesn't refresh his recollection.  
25 Let's move on. How much longer do you have with this witness?

1 MR. McDONALD: Not too much, Your Honor. I'm  
2 thumbing through. I think I am just about done.

3 Q If we go back to column nine of the '683 patent, that's  
4 PX-1. If you go down to the lower part of that column,  
5 Mr. Momyer. I just want to clarify here, we talked about this  
6 earlier, but I forgot to clarify one thing. The process that's  
7 being described here is that the customer or the user of the  
8 system can select which catalogs to search, and then after  
9 those catalogs are selected, then they enter whatever words  
10 they want to search within those selected catalogs?

11 MR. ROBERTSON: I object, Your Honor. The Court  
12 construed selecting product catalogs to search as part of its  
13 claim construction which is in the glossary the jurors have.  
14 This witness can't, by using a preferred embodiment, explain  
15 something contrary to what the Court construed. The inventors  
16 cannot re-construe the claims as they are issued. The Court's  
17 done that.

18 MR. McDONALD: I'm not asking him to construe  
19 anything, Your Honor. I'm asking him how the system works, but  
20 I think my question is totally consistent with the Court's  
21 claim construction about searching selected portions or  
22 selected catalogs.

23 MR. ROBERTSON: Whether it's consistent or not is not  
24 relevant then, Your Honor. I mean, the witness can't  
25 contradict the Court's claim construction. If it's consistent,

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1 then that should control, but going and looking at a preferred  
2 embodiment and then trying to reformulate what the Court's  
3 claim construction is, we should look at the Court's claim  
4 construction. And maybe he wants to ask the witness if the  
5 Court's claim construction is consistent with his understanding  
6 of how the system operated.

7 THE COURT: Objection sustained.

8 Q Mr. Momyer, turning back now to when you worked with IBM,  
9 is it true that when IBM was putting together the system with  
10 Fisher, that would include the TV/2 system with the RIMS  
11 system, that IBM was actually taking actual catalog pages from  
12 the Fisher catalog and trying to reproduce those pretty much  
13 exactly in the demonstration system they were putting together?

14 MR. ROBERTSON: Objection, lack of foundation.

15 THE COURT: If you know.

16 A I'm probably not the best one to ask that question.

17 Q Well, you were working with IBM at the time they were  
18 developing that demo system; right?

19 MR. ROBERTSON: He's answered that question, Your  
20 Honor.

21 THE COURT: You were. He was, so what else?

22 Q Well, do you remember seeing a demo from IBM?

23 A Yes.

24 Q Is it your understanding that that demo had a demo of  
25 pages from the Fisher catalog scanned in by IBM into their

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1 system just like they appear in the paper version of the Fisher  
2 catalog? You saw it; right?

3 A I'm trying to recall that. I'm not the best one to ask  
4 that --

5 THE COURT: Do you remember? If you don't remember,  
6 you don't remember.

7 THE WITNESS: I remember seeing the demo. I don't  
8 remember if that demo was scanned pages or not.

9 Q Do you remember seeing on the screen pages that looked  
10 like a Fisher catalog or not?

11 THE COURT: You mean such as a reproduction of a page  
12 itself?

13 MR. McDONALD: Right, with the same words and the  
14 same images just like in the paper catalog.

15 A Honestly, I can't recall the demo. I know there was a  
16 demo. I can't visualize it.

17 Q Wasn't that the purpose of the demo, to show that?

18 THE COURT: Mr. McDonald, he's now said several times  
19 he knows there was a demo, he just can't remember what it was.  
20 Move on.

21 Q Do you recall that the TV/2 system did have a graphical  
22 user interface with it?

23 A Yes, it did.

24 Q That was before Fisher ever came to IBM to add that;  
25 correct?



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1 MR. ROBERTSON: Objection. How would he know that?

2 THE COURT: Your objection is to lack of foundation?

3 MR. ROBERTSON: Yes, sir.

4 THE COURT: Sustained.

5 Q When you first started talking to IBM about using the TV/2  
6 system, the first time you saw that, did the TV/2 system have a  
7 graphical user interface?

8 A Yes.

9 MR. McDONALD: I have no further questions. Thank  
10 you.

11 THE COURT: Ladies and gentlemen, we'll take the  
12 morning recess for 20 minutes. Go ahead and take your pads  
13 with you.

14  
15 (Jury out.)

16  
17 THE COURT: We'll be in recess.

18  
19 (Recess taken.)

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